LIBRARY
SUPREME COURT, U. S.

AUG 31 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 558

WALTER O. LANFRANCONI, *Petitioner*

v.

TIDEWATER OIL COMPANY, *Petitionee*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN P. CONNARN
25 Keith Avenue
Barre, Vermont 05641
Attorney of Record
for Petitioner

EDWIN W. FREE, JR.
DAVIS, MARTIN & FREE
25 Keith Avenue
Barre, Vermont 05641
Attorneys for Petitioner

TABLE OF CONTENTS

	Page
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
REASONS WHY THE WRIT SHOULD BE GRANTED	4
I. A Conflict Among Circuits	4
II. Misinterpretation of Vermont Law	6
III. Important Questions of Federal Law	8
IV. Usurpation of the Function of the Jury	10
CONCLUSION	12

APPENDIX A	1a
APPENDIX B	11a
APPENDIX C	12a

TABLE OF AUTHORITIES

CASES

Pages

American Surety Co. v. *Schottenbauer,* 257 F.2d 6 (1958) 5

Dagnello v. *Long Island Rail Road Company,* 289 F.2d 797 (1961) 5, 9

Erie R. Co. v. *Tompkins,* 304 U. S. 64 (1938) 6, 8

Fairmount Glass Works v. *Cub Fork Coal Co.,* 287 U.S. 474 (1933) 8, 9

Gray v. *Janicki,* 118 Vt. 49, 99 A.2d 707 (1953) 7, 10

Lanfranconi v. *Tidewater Oil Co.,* 376 F.2d 91 (1967) .. 1, 4, 6, 7

Rogers v. *Bigelow,* 90 Vt. 41, 96 A. 417 (1916) 10

Solomon Dehydrating Co. v. *Guyton,* 294 F.2d 439 (1961) 5

Southern Railway-Carolina Division v. *Bennett,* 233 U.S. 80 (1914) 8

St. Louis Southwestern Ry. Co. v. *Ferguson,* 182 F.2d 949 (1950) 5

Woodhouse v. *Woodhouse,* 99 Vt. 91, 130 A. 758 (1925) 7, 8

Zimmerman v. *Mathews Trucking Corp.,* 203 F.2d 864 (1953) 5

STATUTES

28 U.S.C. § 1254 (1) 2

28 U.S.C. § 1291 (1) 3

28 U.S.C. § 1332 (1) 2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

WALTER O. LANFRANCONI, *Petitioner*

v.

TIDEWATER OIL COMPANY, *Petitionee*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Walter O. Lanfranconi, petitioner herein, by his attorneys, prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the decision of that Court in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, 376 F.2d 91 (2d Cir., 1967), entered on April 29, 1967, affirming the judgment of the United States District Court for the District of Vermont, upon conditions, is set forth in Appendix A. The order of the United States District Court for the District of Vermont (Gibson, J.), entered April 29, 1966, granting judgment on a jury verdict for the plaintiff, petitioner herein, is set forth in Appendix B. The order of the United States District Court for the District of Vermont (Gibson, J.), entered May 24, 1966, entitled, "Order Denying Defendant's Motions" is set forth in Appendix C.

JURISDICTION

Plaintiff, petitioner herein, brought a civil action in United States District Court for the District of Vermont pursuant to the diversity jurisdiction provisions of 28 U.S.C. §1332. The jury found for the plaintiff in the amount of $20,000 compensatory damages and $35,000 punitive damages, and judgment was entered on the verdict.

Defendant appealed to the United States Court of Appeals for the Second Circuit, which Court affirmed the judgment of the District Court upon condition that the appellee, petitioner herein, remit all but $7,500 compensatory and $5,000 punitive damages. The order of the Court of Appeals was rendered on April 7, 1967 and entered in District Court on April 29, 1967.

On July 28, 1967 Mr. Justice White signed an order extending the time for filing a petition for writ of certiorari in this case to and including September 1, 1967, "without prejudice to the Court's consideration of whether this application has been filed in time."

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether a Court of Appeals may condition affirmance of the judgment of a District Court upon the plaintiff's remitting the major portion of exemplary damages awarded him by a jury, where no error of law affecting the award of exemplary damages appears in the record, where the evidence, under the applicable state law, is sufficient to support the verdict, and where the sole reason advanced by the Court of Appeals for imposing the remittitur condition is that "we are convinced that an award of exemplary damages of $35,000 was 'manifestly and grossly excessive' . . . "?

2. Whether the Court of Appeals correctly applied the law of the State of Vermont governing appellate review of asserted excessiveness of exemplary damages?

3. Whether a Court of Appeals has the power to review the asserted excessiveness of a District Court jury's award of damages, and if so, what standards must be applied by the Court of Appeals?

STATUTE INVOLVED

Section 1291 of the Judicial Code, 28 U.S.C. §1291, found in Volume 7 of the United States Code at Pages 5959-60, provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

Petitioner brought a civil action against petitionee Tidewater Oil Company in the United States District Court for the District of Vermont (Gibson, J., presiding), predicating jurisdiction on diversity of citizenship under 28 U.S.C. §1332. The complaint alleged wrongful interference with business relations and sought both compensatory and punitive damages.

The undisputed facts show that petitioner and one Domenichelli were partners in the operation of a retail gasoline station leased from the Tidewater Oil Company under a written lease; that the business was commenced in December, 1953 and was operated continuously by the two partners until June 30, 1961; and that on December 15, 1959, the partners had entered into a lease which under its terms would have expired in December, 1963.

Under the evidence, viewed most favorably to the petitioner as the party prevailing at trial, the jury could reasonably have found that the petitionee and the petitioner's partner conspired to eliminate petitioner from the partnership and to turn sole operation of the station over to the petitioner's partner; that the petitionee's agents fraudulently represented to the petitioner that his partner had effectively cancelled the partnership's lease and that they had deceived the petitioner into signing a cancellation form by representing to him that his signature was needed as a "mere formality" and that neither partner would thereafter operate the station; that on July 1, 1961, the day after the cancellation became effective, Tidewater turned sole operation of the station over to petitioner's former partner, who has continued to operate it ever since; that petitioner would not have

signed the cancellation but for the false representations of the petitionee's agents; and that as a consequence of the petitionee's wrongful behavior, the petitioner suffered actual damages in the amount of $7,500. Evidence of the defendant's wealth was submitted to the jury on the issue of exemplary damages, showing profits for a single year of $258,000,000.

The jury's verdict awarded actual damages of $20,000 and punitive damages of $35,000 to petitioner, and judgment was entered thereon in District Court. The Court of Appeals for the Second Circuit affirmed the judgment of the District Court on the condition that the petitioner execute two remittiturs. The first remittitur is for $12,500 of the actual damages awarded by the jury, and petitioner recognizes that the Court of Appeals was correct in this respect, because the evidence presented in the case cannot support a finding of actual damages in an amount greater than $7,500. The second remittitur is for all but $5,000 of the punitive damages, and it is the propriety of the Court's prescribing this remittitur as a condition of affirmance which petitioner seeks by this petition to have reviewed.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

A CONFLICT AMONG CIRCUITS

This case presents a situation where the Court of Appeals for the Second Circuit has found — whether as a matter of law or of fact is not clear — that $35,000 punitive damages awarded by a District Court jury against the Tidewater Oil Company were "manifestly and grossly excessive," 376 F.2d 91, 96, and that $30,000 of that sum should be remitted as a condition of affirmance. The District Court judge, in the exercise of his discretion, had previously refused to order such a remittitur. (Appendix C.)

This action of the Court of Appeals for the Second Circuit thus directly conflicts with the position of the Court of Appeals for the Eighth Circuit, whose position was comprehensively restated in 1950

in the case of *St. Louis Southwestern Ry. Co.* v. *Ferguson*, 182 F.2d 949, and which reads in part:

> We have said many times that the excessiveness or inadequacy of a verdict is not a question for our consideration, but that the entreaty for any such vice lies solely to the judgment and the conscience of the trial judge on motion for a new trial. This is because the amount of a verdict is primarily a factual evaluation on inabsolute elements, while our function traditionally has been regarded as extending only to a testing of the soundness of the processes by which such a result has been achieved. 182 F.2d 949, 954.

The Eighth Circuit has consistently adhered to this position since 1950. Cf. *Zimmerman* v. *Mathews Trucking Corp.*, 203 F.2d 864, 868 (1953), *American Surety Co.* v. *Schottenbauer*, 257 F.2d 6, 13 (1958).

And in 1961, shortly after the Second Circuit in *Dagnello* v. *Long Island Rail Road Company*, 289 F.2d 797, retreated from its former position that the size of a verdict was not reviewable by a Court of Appeals, the Eighth Circuit had an opportunity to reexamine its own position and in *Solomon Dehydrating Co.* v. *Guyton*, 294 F.2d 439, refused to join the Second Circuit in retreat.

> We do emphasize again, however, that in our opinion, inadequacy or excessiveness of a verdict is basically, and should be, a matter for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of the witnesses and which knows the community and its standards; that this is a responsibility which, for better working of the judicial process and for other seemingly obvious reasons, is best placed upon its shoulders; and that we shall continue to consider review, as we have said before, not routinely and in every case, but only in those rare situations where we are pressed to conclude that there is "plain injustice" or a "monstrous" or "shocking" result. Perhaps this is saying nothing more and nothing different than what the other courts of appeals have said in varying language. Perhaps in practice this court has observed a somewhat tighter standard than the others. *In any event, we still adhere to it.* 294 F.2d 439, 447-448 (Emphasis added.)

In addition to this rather absolute conflict regarding the powers of Courts of Appeals, it should be noted that most of the cases which

assert the reviewability of the size of a verdict in general terms are dealing, in fact, with compensatory damages and not punitive damages. Also involved in the present case is the fact that no error of law relating to exemplary damages was found by the Court of Appeals, which if any had been found, might have justified the Second Circuit's order for a remittitur. Thus the conflict between Circuits presented by this case is more acute than appears from the general language of the cases.

Because the Second Circuit has in this case exercised an asserted power to review the alleged excessiveness of punitive damages awarded in a District Court, and because the Eighth Circuit denies the existence of such a power of review, the petitioner respectfully submits that this Honorable Court ought to grant this Petition for a Writ of Certiorari, in order to reconcile this conflict between Circuits.

II.

MISINTERPRETATION OF VERMONT LAW

It appears that in the present case, the Court of Appeals for the Second Circuit has adopted as its rule of practice for cases arising in the District Court for the District of Vermont a rule which is a product of a misinterpretation of the rule set down by the Supreme Court of Vermont. In a diversity jurisdiction case such as this is, such a misinterpretation would in itself be a sufficient ground for reversal under the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938).

In this case, where the trial judge had refused to order a remittitur, the Second Circuit issued such an order upon a finding merely that "we are convinced that an award of exemplary damages of $35,000 was 'manifestly and grossly excessive' . . ." 376 F.2d 91, 96. The Vermont rule is that where the trial judge has refused to order a remittitur, an appellate court will interfere only upon finding an abuse of discretion on the part of the trial judge. It is only when the trial judge has, in fact, ordered a remittitur that an appellate court may order a further remittitur on the grounds that the

final award made by the trial court is still "manifestly and grossly excessive".

The leading case is *Woodhouse* v. *Woodhouse,* 99 Vt. 91, 130 A. 758 (1925) and was cited by the Court of Appeals in its opinion, 376 F.2d at 96. In the *Woodhouse* case, the Court stated the standard for a trial judge's interference with a jury's assessment of damages as follows:

> In those cases where there is no legal measure of damages, and they are unliquidated so the amount thereof is referred to the judgment and legal discretion of the jury, the court ordinarily will not interfere with their verdict, unless it clearly appears that the damages found are excessive or insufficient. Although the verdict may be considerably more or less than, in the judgment of the court, it ought to have been, still it will decline to interfere unless the amount is so great or small as to indicate that it is the result of perverted judgment, accident, or gross mistake. *Woodhouse,* supra at 157.

And with respect to a trial court's disposition of motions such as were made and denied in the case at bar (Appendix C), the Vermont Supreme Court narrowly restricted its own powers of review to the finding of abuse of discretion on the part of the trial judge.

> Should this Court, in the exercise of its revisory power, reverse the action of the trial court in disposing of the motion to set the verdict aside? Admittedly not, unless abuse of discretion is shown by the record. As to this, the recognized test is whether the discretion of the court has been exercised on grounds or for reasons clearly untenable, or to an extent clearly unreasonable. *Woodhouse,* supra at 160.

That the Second Circuit misapplied this rule of Vermont law is apparent from the fact that nowhere in the Court's opinion did it find that the District Judge had committed an abuse of discretion. Instead, the Second Circuit found that in its judgment, the verdict was "manifestly and grossly excessive", citing the case of *Gray* v. *Janicki,* 118 Vt. 49, 99 A.2d 707 (1953), a case which in turn cites the *Woodhouse* case. But both of those cases make clear that the "manifestly and grossly excessive" standard is applicable only after a trial court has already ordered a remittitur and not when a

trial court has refused so to order. *Woodhouse,* supra at 160, *Gray,* supra at 51-52.

It is important to bench and bar of the state of Vermont that lack of "uniformity in the administration of the law of the State", *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 75, be eliminated and that state courts and federal courts employ the same rule of practice in this regard; and for the standardization of practice in both systems, the petitioner respectfully submits that this Honorable Court ought to grant the Petition, in order to correct what appears to be a manifest misinterpretation of Vermont law.

III.

IMPORTANT QUESTIONS OF FEDERAL LAW

Petitioner believes that this Petition should also be granted for one of two alternative reasons. Either, as petitioner believes, this Court has already decided that a Court of Appeals has no power to review the asserted excessiveness of damages awarded by a District Court jury, and the Second Circuit has nevertheless undertaken just such a review; or, as the Second Circuit believes, this Court has not decided the questions presented by this case, and the petitioner believes that the question is one which frequently recurs and which is of great importance in the administration of justice in the federal court system and ought finally to be settled by this Court.

Petitioner believes that the question of the power of a Court of Appeals to review a "mere excess upon the evidence", *Southern Railway — Carolina Division* v. *Bennett,* 233 U. S. 80, 87 (1914, Holmes, J.), was decided by this Court in 1933 in the case of *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474. In that case, Mr. Justice Brandeis said:

> The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for *error of fact* has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals. *Fairmount Glass,* supra at 481, emphasis added.

If indeed, that case settled the question presented by the case at bar, as the petitioner believes it did, then the action of the Court of Appeals for the Second Circuit in undertaking to review the asserted excessiveness of the verdict in the present case, where no error of law was made to appear, was clearly contrary to the decision of this Court, and for that reason, the Petition ought to be granted.

But in *Dagnello* v. *Long Island Rail Road Company*, 289 F.2d 797 (1961), the Court of Appeals for the Second Circuit denied at Page 800 that the *Fairmount Glass* case had settled the present question. Assuming that the Second Circuit is correct in its reading of *Fairmount Glass*, it is the petitioner's position that the question ought to be settled by this Honorable Court in the interests of efficiency of judicial administration and uniformity in the processes of justice. The question has arisen repeatedly (a partial list of the federal cases is contained in footnote 6 of the *Dagnello* opinion, supra), and the answers given by the various courts have not been uniform.

Among the questions which the petitioner would respectfully suggest that this Court might see fit to answer definitively by granting this Petition are the following:

(1) May a Court of Appeals order a remittitur where the compensatory damages awarded can be supported by the evidence but where the Court of Appeals finds the award to be excessive?

(2) May a Court of Appeals order a remittitur of punitive damages awarded by a jury, where evidence submitted to the jury would support the verdict, but where the Court of Appeals finds the jury's award to be excessive?

(3) May a Court of Appeals order a remittitur where no error of law appears in the record?

(4) In any case where it may be held that a Court of Appeals has power to order a remittitur, what is the standard of excessiveness by a jury or abuse of discretion by a judge which must be applied by the Court of Appeals?

(5) In any case in which a remittitur would be proper, should the damages be remitted to the lowest amount which a jury

might properly award, to the highest amount which can be supported by the evidence, or to an intermediate amount?

For the reason that the preceding questions are important to the administration of the federal court system and can be effectively settled only by a decision by this Honorable Court, the petitioner respectfully submits that his Petition ought to be granted.

IV.

USURPATION OF THE FUNCTION OF THE JURY

In the present case, the Court of Appeals for the Second Circuit found no error of law relating to the award of exemplary damages. Any error the Court found relating to the compensatory damages was adequately remedied by the Court's ordering a remittitur of all but $7500 compensatory damages, which were separately awarded by the jury and not combined with the exemplary damages.

In addition, there was the evidence of the petitionee's behavior toward the petitioner, and the jury was properly charged by the trial court that punitive damages "are given to stamp the condemnation of the Jury upon the acts of the Defendant on account of their malicious or oppressive character . . ." The jury was also properly charged under Vermont law that "where punitive damages are awarded, the wealth of the Defendant at the time of trial may be considered by you as an element in the determination of what would be a just punishment for it." And the evidence which the jury had in its hands showed the defendant had profits of $258,000,000 in one year.

Vermont law also clearly holds that "[Exemplary damages] cannot be measured by any precise rules, but are awarded in the discretion of the jury . . ." *Rogers* v. *Bigelow,* 90 Vt. 41, 49, 96 A. 417 (1916). In its opinion, the Court of Appeals paid lip service to this rule: "We are mindful of the rule that because punitive damages are incapable of precise determination, their assessment is 'largely discretionary with the jury,' *Gray* v. *Janicki,* 118 Vt. 49, 99 A.2d 707, 709 (1953)". But then the Court proceeded to make

an independent judgment as to what sum would be appropriate to award as punitive damages and determined that sum to be $5000 and ordered a remittitur accordingly. And this was done despite the fact that the Court of Appeals had found no reversible error in the record and despite the fact that the jury had before it sufficient evidence to support an award of $35,000 punitive damages.

In short, the Court of Appeals constituted itself a jury and assessed damages as it, in its sole discretion, deemed appropriate. The petitioner believes that such a usurpation of the function of the jury by the Court of Appeals ought not to be condoned by this Honorable Court, and that the action of the Court of Appeals so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. For this reason, the petitioner respectfully submits that the Petition ought to be granted.

CONCLUSION

Because it appears that (1) the Courts of Appeals for the Second Circuit and the Eighth Circuit disagree concerning the power of a Court of Appeals to review the asserted excessiveness of a jury's award of exemplary damages; (2) the Court of Appeals for the Second Circuit has adopted as its rule of practice for cases arising in the District Court for the District of Vermont a rule which misapplies the rule of law set forth by the Vermont Supreme Court; (3) there is a serious question whether the questions presented by this case have been previously decided by this Court, and if they have, have been decided contrary to the practice adopted in this case by the Court of Appeals for the Second Circuit; and (4) the Court of Appeals for the Second Circuit in this case usurped the function of the District Court jury by determining for itself what an appropriate award of punitive damages would be, the petitioner respectfully urges this Honorable Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

JOHN P. CONNARN
25 Keith Avenue
Barre, Vermont 05641
Attorney of Record
for Petitioner

EDWIN W. FREE, JR.
Davis, Martin & Free
25 Keith Avenue
Barre, Vermont 05641
Attorneys for Petitioner